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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:	)	
	)	ET Docket No. 97-99
Amendment of the Commission's Rules	)	
To Relocate the Digital Electronic Message	)	
Service From the 18 GHz Band to the	)	
24 GHz Band and To Allocate the	)	
24 GHz Band for Fixed Service	)	

PETITION FOR PARTIAL RECONSIDERATION OF THE MILLIMETER WAVE CARRIER ASSOCIATION, INC.

MILLIMETER WAVE CARRIER ASSOCIATION, INC.

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SUMMARY

The Millimeter Wave Carrier Association, Inc. ("MWCA") hereby requests partial reconsideration of the *Order* released March 14, 1997, restructuring the Digital Electronic Messaging Service ("DEMS"). In a wholly unprecedented departure from administrative practice, the *Order* couples major revisions to the DEMS allocation with a few actions taken to protect military space systems, thereby bypassing notice and comment procedures under the "military" exemption to the Administrative Procedures Act ("APA"). MWCA does not take issue with the *Order*'s protection of military systems in the 18 GHz by terminating the rights of 18 GHz DEMS incumbents to operate in that spectrum. In fundamentally altering DEMS, however, the *Order* implicates grave competitive consequences and impacts substantive rights without the due process that is the basis for legitimate administrative action. As discussed herein, the FCC must therefore void the aspects of the *Order* relating to the 24 GHz Fixed Services band and initiate a new rulemaking, subject to the APA, to examine the full implications of this new spectrum allocation.

The *Order*'s sweeping use of the "military" exemption is contrary to both sound public policy and legal precedent. As an initial matter, exemptions to the APA are "narrowly construed and only reluctantly countenanced." The leading case defining the contours of the military exemption thus makes clear that agencies are entitled to use the exemption: (i) only to the extent that a military function of the agency is directly involved, and then only to the extent of that military function; (ii) only in cases of emergency; and (iii) only to the extent that the substantive rights of third parties are not implicated. The *Order* fails to justify its actions with respect to the 24 GHz band on any of these grounds. Moreover, even if use of this exemption could be legally

countenanced—which it cannot—the broad nature of the changes and the lack of time urgency to the rule changes compels notice and comment rulemaking as a matter of sound public policy.

Because the significant public policy and technical issues decided in the *Order* were shielded from public scrutiny and debate, the conclusions reached in the *Order* failed to consider important public interest considerations and cannot be sustained on the record. Indeed, the *Order* fails to even acknowledge that the number of DEMS channels is being halved, a critically important consideration in a service where scarcity has dictated one-per-market rules and where, due to putative waivers granted to a company and its affiliates, the change results in a *de facto* DEMS monopoly in most major markets in the country. This change alone constitutes a reversal of long-standing Commission policies favoring multiple entry and competition and should not have been accomplished without due public consideration on the record. The *Order* similarly fails to justify quadrupling the size of the DEMS channels on a technical basis or to examine the full range of equitable considerations relevant to preserving incumbents' rights by granting them extensive spectrum rights in a new band.

The *Order* cannot be sustained on a legal, technical, or policy basis. The military exemption to the APA, in particular, cannot be used to shield from public processes broad, far-ranging policy decisions merely by bootstrapping off of a limited national security interest in a different spectrum band. Due to the lack of notice and comment, the *Order* fails to consider highly important competitive, technical, and equitable factors and, as a result, reaches conclusions that are manifestly contrary to the public interest. The rules relating to the 24 GHz band must therefore be voided and a new rulemaking initiated—fully compliant with APA notice and comment requirements—to examine DEMS restructuring.

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PETITION FOR PARTIAL RECONSIDERATION OF THE MILLIMETER WAVE CARRIER ASSOCIATION, INC.

The Millimeter Wave Carrier Association, Inc. ("MWCA"), by its attorneys, hereby petitions for partial reconsideration of the above-captioned order.[1] As discussed below, the *Order* invokes the "military" exemption to the Administrative Procedures Act[2] to accommodate national security needs for satellite transmission systems in the 18 GHz band without prior notice and comment. Large parts of the *Order*, however, extend well beyond any "military" function of the agency to exempt from public notice and comment decisions fundamentally restructuring the Digital Electronic Message Service ("DEMS") and granting extensive spectrum rights to a single entity and its affiliates. Because these significant public policy and technical issues were shielded from public scrutiny and debate, the conclusions reached in the *Order* failed to consider important public interest considerations and cannot be sustained on the record. As discussed

[1] Amendment of the Commission's Rules To Relocate the Digital Electronic Message Service From the 18 GHz Band to the 24 GHz Band and To Allocate the 24 GHz Band for Fixed Service, ET Docket No. 97-99 (Mar. 14, 1997) ("*Order*").

[2] 5 U.S.C. §§ 500 *et seq.* ("APA").

below, the Commission must void those aspects of the *Order* relating to the 24 GHz Fixed Services allocation and initiate a rulemaking proceeding subject to the APA to examine the technical and policy issues raised by reallocating DEMS.

I. INTRODUCTION AND BACKGROUND

In 1984, the Commission allocated 200 MHz at 18.82-18.92/19.16-19.26 GHz ("18 GHz band") for DEMS.[3] This allocation was comprised of 10 DEMS channel pairs. Each channel pair was allocated 10 MHz for nodal station-to-user station transmissions and 10 MHz for user station-to-nodal station transmissions. These 10 channels were further divided into two pools, with 5 channels licensed under Part 21 for common carriers and 5 channels licensed under Part 94 for private entities. In both services, the Commission adopted policies precluding any applicant from obtaining more than one channel pair in a market absent a showing that the existing channels were fully utilized.[4] Ultimately, the 10 channels were reunited under Part 101 as part of the revision and consolidation of the microwave rules, but separate sections within Part 101 govern the operation of formerly private and formerly common carrier DEMS channels.[5]

The 18 GHz band lay largely fallow until quite recently. Beginning around 1993, Associated Communications and several affiliates began acquiring DEMS licenses in the largest markets of the country. Despite the Commission's restrictive conditions on ownership of multiple DEMS channels in a market, Associated and its affiliates ultimately succeeded in

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[3] *Digital Termination Systems*, 56 Rad. Reg. 2d (P & F) 1171 (1984).

[4] *See* 47 C.F.R. § 101.505(b); 47 C.F.R. § 101.147(r)(9)(i).

[5] *Establishment of a New Part 101*, 11 FCC Rcd 13449 (1996).

obtaining—in many cases—all five common carrier DEMS authorizations for major cities across the country. In total, Associated and its affiliates hold a *de facto* monopoly in common carrier DEMS licenses in at least 31 of the country's largest markets.[6] Associated's progress was halted when DEMS licensing was frozen by the Commission in August of 1996 due to potential interference concerns relating to a satellite proposal by Teledesic overlapping the 18 GHz band.[7]

In related contemporaneous developments, as noted in the *Order*, in July of 1995 the Commission amended the Table of Allocations to add a new footnote (US334) permitting the use of the 17.8-20.2 GHz band for Government space-to-Earth satellite transmissions.[8] Early this year, the Government apparently determined that DEMS operations in the 18 GHz band would cause interference to two earth stations the Department of Defense intended to deploy in Washington, D.C. and Denver, Colorado. Accordingly, on January 7, 1997 and on March 5, 1997, the National Telecommunications and Information Administration ("NTIA") forwarded

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[6] Joint Opposition to Consolidated Petition To Deny and Petition To Determine Status of Licenses, File Nos. 9607682 *et al.* (Sept. 16, 1997) at 5. As noted in Teledesic's reply to this pleading: "The four DEMS applicants requesting virtually all of the available channels pairs in each market are affiliates of one another. They are: (1) the Associated Group; (2) [Microwave Services, Inc. or] MSI, a wholly owned subsidiary of the Associated Group; (3) Associated Communications (formerly DMT, L.L.C), a joint venture between MSI and DSC which is ultimately controlled by the Associated Group through MSI; and (4) [Digital Services Corporation or] DSC, a minority owner in the Associated Communications/DMT joint venture, whose stations have apparently been committed to an entity controlled by the Associated Group under a management agreement." Reply Brief In Support of Consolidated Petition To Deny and Petition To Determine Status of Licenses, File Nos. 9607682 *et al.* (Sept. 23, 1997) at 1 n.1.

[7] Freeze on the Filing of Applications for New Licenses, Amendments, and Modifications in the 18.8-19.3 GHz Frequency Band, DA 96-1481 (Aug. 30, 1996).

[8] *See Order* at ¶ 2 (citing *Fixed Satellite Service in the 17.8-20.2 GHz Band*, 10 FCC Rcd 9931 (1995)).

letters to the Commission urging the FCC to reallocate the DEMS band.[9] To facilitate this relocation, NTIA offered to transition Government operations out of 24.25-24.45/25.05-25.25 GHz ("24 GHz band"). NTIA did, however, indicate that the new 24 GHz band would not be available for non-government use in areas surrounding Washington, D.C. and Newark, N.J. until Federal Aviation Administration ("FAA") radars in those areas were decommissioned, respectively, on January 1, 1998, and January 1, 2000.

Faced with this situation, the Commission could have simply continued the freeze at 18 GHz and adopted interim rules to ensure the interference-free operations of military systems in the 18 GHz band. Specifically, MWCA believes the FCC could even have taken the following steps consistent with the military exemption to the APA:

- Replaced the existing interim coordination procedures with permanent coordination requirements as specified by the NTIA;
- Modified the Part 101 rules to prohibit any new low power outdoor operations within 55 km (or any new low power indoor operations within 20 km) of a specified latitude and longitude intended to protect earth stations in Washington, D.C. and Denver, Colorado;
- Required all 18 GHz DEMS licensees in the Washington, D.C. and Denver, Colorado areas to cease operation immediately; and,
- Required all 18 GHz DEMS licensees outside the Washington, D.C. and Denver, Colorado areas to cease operation no later than January 1, 2001.

Arguably, all of these steps were necessary to protect military space systems in the 18 GHz band and, notwithstanding any public debate, were compelled by national security exigency.

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[9] Letter from Richard Parlow, Associate Administrator, Office of Spectrum Management, NTIA, to Richard Smith, Chief, Office of Engineering and Technology, FCC, dated January 7, 1997; Letter from Richard Parlow, Associate Administrator, Office of Spectrum Management, NTIA, to Richard Smith, Chief, Office of Engineering and Technology, FCC, dated March 5, 1997.

The *Order*, however, appends a lengthy list of additional, severable decisions to the measures needed to protect national security operations. This appears to be only the third time in over 50 year history of the APA that the FCC invoked this exemption.[10] Furthermore, the *Order* extends the military exemption to take a range of actions that go well beyond protecting military systems in the 18 GHz band. Specifically, the *Order*:

- Allocated the 24 GHz band for Fixed Service use;
- Determined that DEMS was incapable of existing as a service without nationwide uniformity in allocation;
- Determined that achieving "equivalency" in the 24 GHz band for incumbent 18 GHz providers requires granting those incumbents four times as much spectrum in the new band;
- Adopted a channel plan for the newly allocated 24 GHz Fixed Service halving the number of DEMS channels band by providing only 5 pairs of 40 MHz channels (*i.e.*, each channel pair comprising a total of 80 MHz of spectrum),[11] thereby effectively granting a virtual DEMS monopoly to Associated and its affiliates;

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[10] The military exemption was previously used in 1985 in amending Part 87 to implement security control of air traffic systems. *See Security Control of Air Traffic and Air Navigation Aids*, 1985 FCC LEXIS 2237 (Nov. 1985). More recently, the exemption was used to allocate the 17.8-20.2 GHz band for government space-to-Earth operations. *See Fixed Satellite Service in the 17.8-20.2 GHz Band*, 10 FCC Rcd 9931 (1995). In both of these cases, fulfillment of a military function was clear. Indeed, even in the latter case, where the FCC also changed other footnotes in the same order, the FCC provided an independent basis for not adhering to notice and comment procedures.

[11] Although the *Order* does not acknowledge the halving of the number of channels, it is clear that is contemplated by the *Order*. As an initial matter, the first paragraph of the *Order* explicitly states that the order is "relocat[ing] . . . [DEMS] . . . from the 18.82-18.92 GHz and 19.16-19.26 GHz bands," which constitutes 200 MHz encompassing both the formerly private and the formerly common carrier DEMS channels—10 channel pairs in total. Moreover, the amendments to Section 101.501 state that "[i]n that DEMS operations will be transitioned to the 24 GHz band, applications for new facilities using the 18 GHz channels identified in Section 101.147(r)(9) are not acceptable for filing." *Order* at Appendix A, ¶ 14. Section 101.147(r)(9) lists a total of 10 channels designated channels 25-34. The *Order*, however, adopts a 4:1 spectrum equivalency in the 24 GHz band, which means that each channel pair in the 24 GHz

(Continued...)

- Modified the authorizations of 18 GHz DEMS licensees in the Washington, D.C. area to provide such licensees with new DEMS frequencies in the newly allocated 24 GHz Fixed Service band after January 1, 1998;

- Modified the authorizations of 18 GHz DEMS licensees in the Newark, New Jersey area to provide such licensees with new DEMS frequencies in the newly allocated 24 GHz Fixed Service band after January 1, 2000;

- Modified the authorizations of 18 GHz DEMS licensees outside the Washington, D.C. and Newark, New Jersey areas to provide such licensees with new DEMS frequencies in the newly allocated 24 GHz Fixed Service band;

- Dismissed pending DEMS applications that had not passed the 60 day cut-off period for competing applications by the time of the 18 GHz licensing freeze; and,

- Indicated that the Commission will soon initiate a licensing proceeding to develop regulations for issuance of new licenses in the 24 GHz band.

Notwithstanding the broad scope of these changes—including one of the largest new spectrum allocations in recent times—these rule alterations were made without the benefit of notice and comment procedures under the APA.

II. BROAD ASPECTS OF THE *ORDER* CANNOT BE JUSTIFIED UNDER THE MILITARY EXEMPTION TO APA NOTICE AND COMMENT PROCEDURES

The APA provides the ground rules for agency actions by guaranteeing due process and by ensuring fundamental fairness. The linchpin of the APA rulemaking provisions—and therefore the cornerstone of a legitimate administrative state—are the notice and comment

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(...Continued)
band is a total of 80 MHz. Because the 24 MHz band comprises only 400 MHz, simple mathematics shows that only 5 DEMS channel pairs are available at 24 GHz. In any event, inasmuch as both the common carrier and private 18 MHz DEMS channels overlap the military satellite band and are subject to nearly identical power and emissions limits, failing to relocate all 10 channel pairs, in fact, would be irrational and completely at odds with the *Order*'s technical analyses, such as they exist.

requirement for proposed rules. Without notice, affected parties cannot prepare for, or argue against, rules with the full force of federal law that impact their fundamental rights. Without informed comment, there is no opportunity for interested parties to air their different perspectives and offer data that is usually required for expert agencies to render informed and balanced decisions.[12] Without allowing interested parties to offer new ideas and publicly debate policy, there is no opportunity to reap the benefits of the adversarial process, whereby opinions are probed, facts examined, and truth exposed. Without the adversarial process and public spirited debate, there is no record upon which the expert agency may make reasoned judgments in the public interest. And, without reasoned decisionmaking on the record, there is no legitimacy to administrative action.

For these reasons, Section 553 of the APA requires that an agency provide "[g]eneral notice of proposed rule making," including "the terms or substance of the proposed rule or a description of the subjects and issues involved."[13] The APA also requires that, "[a]fter notice required by this section, the agency *shall* give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments."[14] Only two exceptions to these procedures are recognized, "to the extent there is involved . . . a military or foreign affairs function of the United States," and for certain rules involving internal agency

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[12] *See, e.g., Batterston v. Marshall*, 648 F.2d 694, 703 (D.C. Cir. 1980) (stating purpose of APA notice and comment provisions: "to reintroduce public participation and fairness to affected parties after governmental authority has been delegated to nonrepresentative agencies," and to "assure[] that the agency will have before it the facts and information relevant to a particular administrative problem, as well as suggestions for alternative solutions.").

[13] 5 U.S.C. § 553(b).

[14] 5 U.S.C. § 553(c) (emphasis added).

management. For the reasons discussed above, however, courts have held that these APA exemptions are to be "narrowly construed and only reluctantly countenanced."[15]

Under applicable precedent, the *Order*'s expansive use of the "military" exemption to the APA's notice and comment requirements is patently impermissible. As discussed below, the Commission, while taking a few actions legitimately necessary to national security, has improvidently linked those actions with a broad range of far-reaching policy and spectrum allocation decisions that are entirely severable, unnecessary to the military functions of the agency, and contrary to the public interest. If the agency and courts were to countenance a blanket exemption from the APA merely because some aspects of a case touch on military interests, the exception would swallow the rule. Courts, however, have not permitted the "military" clause of Section 553(a)(1) to cannibalize the APA.

Independent Guard Ass'n of Nevada v. O'Leary, 57 F.3d 766 (9th Cir. 1995), is the leading case defining the contours of military exemption. There, the Department of Energy ("DoE") invoked Section 553(a)(1) in prescribing, without notice and comment, supplementary personnel management requirements. These requirements were applied to its own personnel as well as independent contractors guarding a nuclear weapons testing facility pursuant to DoE's statutory authority over security and safety standards for its defense programs. The *Independent Guard* court held that DoE was not entitled to rely on the military exemption. Specifically, the court found that an agency invoking the exemption must itself be performing a "military

[15] *American Federation of Government Emp., AFL-CIO v. Block*, 655 F.2d 1153 (D.C. Cir. 1981); *New Jersey v. EPA*, 626 F.2d 1038, 1045 (D.C. Cir. 1980).

function" and the exemption was available only "to the extent" of that function.[16] Moreover, the court found that the term "military function" has measurable contours and stated "[t]he statute's text strongly suggests that those contours are defined by the specific function being regulated."[17]

Under the present facts, it is arguable that the FCC performs a military function in providing spectrum for, and ensuring other operations do not interfere with, military space systems in the 18 GHz band. This provides what may be a sound basis for invoking the military exemption to require DEMS incumbents immediately to cease operations in Washington, D.C. and Denver, Colorado where military earth stations are located and, in the future, to cease all operations in the 18 GHz band as the military deploys additional facilities. These specific decisions are dictated by the military's needs and only one outcome is possible, thus rendering informed public debate superfluous. As soon as interference-free operation of 18 GHz military space systems is assured, however, the "extent of" the FCC's military function ceases and, along with it, the availability of the military exemption to the APA.

There is no basis for the *Order* to assert that decisions relating to the new Fixed Service allocation at 24 GHz should not be subject to notice and comment procedures. As stated in the *Independent Guard* case:

> Congress intended the military function exception to have a narrow scope. The Report of the Senate Judiciary Committee emphasized that "the exceptions apply only 'to the extent' that the excepted subjects are directly involved." S.Doc. No. 248, 79th Cong., 2d Sess. 199 (1946) (emphasis added). The Judiciary Committee continued: "[T]he exemption of situations of emergency or necessity is not an 'escape clause' in the sense that any agency has

[16] *Independent Guard*, 57 F.3d at 769.

[17] *Id.*

> discretion to disregard its terms or the facts. A true and supported or supportable finding of necessity or emergency must be made and published. 'Impracticable' means a situation in which the due and required execution of the agency functions would be unavoidably prevented by its undertaking public rule-making proceedings." *Id.* at 200.[18]

Obviously, the actions taken in the *Order* with respect to the 24 GHz band are not "directly related" to the Commission's military functions. If DoE cannot invoke the exemption to develop rules for personnel at *military* facilities guarding *military* weapons, a nexus between the *Order*'s actions with respect to the 24 GHz band and the operations of military systems in the 18 GHz band is not even arguable. The fact that the *Order*'s determinations do not rely on military exigency is amply illustrated by the inclusion in the *Order* of a technical appendix purportedly justifying quadrupling the spectrum rights of incumbents. If the outcome of the *Order* were pre-ordained by military need, no such exhibit would be necessary.

As the court noted in the *Independent Guards* case, a broad reading of the provision sweeps too expansively:

> The legislative history and relevant case law direct that exceptions to the APA be narrowly construed, and that the exception can be invoked only where the activities being regulated directly involve a military function. If [a broad reading of the exemption] . . . were adopted, and contractor support activities held to be within the scope of the military function exception, . . . even window washers could find their undoubtedly necessary support tasks swept within the exception's ambit, and DOE regulations affecting their employment exempt from notice and comment. Neither the statute, nor common sense, requires such a result.[19]

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[18] *Id.*, 57 F.3d at 769.

[19] *Id.*, 57 F.3d at 770.

In the present case, if the military exemption were sufficient to shield any aspect of *any* order taking *any* action to protect military operations, the APA would be rendered superfluous. Any action, no matter how severable, could be tenuously linked to a military need and exempted from public proceedings.[20] Courts have held that they "will not allow a regulation otherwise subject to section 553 procedures to piggyback on regulations properly issued in response to a sudden exigency when to do so would result in that regulation's being 'chiseled into bureaucratic stone.'"[21]

Moreover, public policy obviously favors taking comment on the Fixed Service allocation at 24 GHz. Unlike the situation at 18 GHz, where only one result could obtain, the *Order*'s determinations on the 24 GHz band were subject to an almost endless variety of permutations in terms of the number of channels and channel sizes alone. The public interest benefits of these and the various other potential outcomes should have been evaluated. Plainly, as discussed in Section III, the 24 GHz allocation poses a variety of technical possibilities, each implicating different public policy goals. This is precisely the type of determination for which the APA mandates the opportunity for public participation.

MWCA further notes that there is no "exigency" or "emergency" requiring the FCC to act quickly without adequate rulemaking procedures. In most areas, in fact, the DEMS incumbents

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[20] For example, due to the need to protect military radars in the subject bands, the *Order*'s reading of the military exemption would have allowed adoption of the recent Unlicensed National Information Infrastructure device allocation without public notice or comment. *See U-NII Devices,* 12 FCC Rcd 1576 at ¶¶ 5, 73 (noting sharing criteria with military radars).

[21] *U.S. v. L. J. Garner*, 767 F.2d 104, 120 (5th Cir. 1985) (*citing American Federation of Government Employees v. Block*, 655 F.2d 1153, 1157 (D.C. Cir. 1981) (regulations responding to much more than emergency must be promulgated through public procedures)).

are not required to terminate 18 GHz operations until January 1, 2001. The lack of any emergency is further highlighted by the fact that, until issuance of the *Order*, the 18 GHz band was subject to an administrative freeze in any event. Given that there is no "supported or supportable finding of necessity or emergency" warranting preclusion of public participation, the use of the exemption is illegal. Indeed, even if extension of the exemption was arguably appropriate to cover the 24 GHz rulings, the FCC has in the past undertaken rulemaking proceedings despite the involvement of some military interests.[22] In other words, even if a supportable military function existed, the FCC is not required to invoke the military exemption to the APA and it was an abuse of its discretion to do so given that it had sufficient time to conduct a rulemaking.

In addition, the APA's rulemaking exceptions "are unavailable to the agency if the action substantially affects third parties."[23] In the present case, the *Order* makes available 400 MHz of previously government spectrum and sets up a transition mechanism whereby, because of the halving of the number of DEMS channels, a *de facto* monopoly is granted to a single company and its affiliates. This action clearly affects MWCA members' ability to enter the 24 GHz DEMS marketplace, as well as impacting their ability to compete for wireless local loop traffic in the millimeter wave bands. As courts have stated, "[t]he reading of the [Section] 553 exemptions that seems most consonant with Congress' purpose in adopting the APA is to construe them as

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[22] *See, e.g., infra,* n.20.

[23] Stein, Mitchell & Mezines, *Administrative Law* (M. Bender Supp. Feb. 1997) at § 15.02[1].

an attempt to preserve agency flexibility in dealing *with limited situations where substantive rights are not at stake.*"[24]

As a final matter, the *Order* also attempts to invoke the "good cause" provision of Section 553(b)(3)(B), which states:

> [Notice and comment procedures are not required when] the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.[25]

The sole statement in the *Order* regarding the "good cause" exemption states that "based on national security needs and because notice and public comment and procedures are otherwise, for good cause shown, unnecessary and contrary to the public interest, notice and comment procedures need not be followed prior to adoption of these rules."[26] The reliance on "national security," however, is entirely circular and, as discussed above, wholly illegitimate with respect to the 24 GHz decisions in the *Order*. Thus, nowhere does the *Order* make any "showing" of the good cause rendering notice and comment "unnecessary" or why notice and comment is contrary to the public interest when developing rules for DEMS at 24 GHz. Nor could the *Order* make either of these showings; the determinations on the new band in the *Order* are subject to an infinite variety of outcomes that should rightfully be guided by informed public debate.

Fundamentally, MWCA does not object to either allocating additional spectrum in the 24 GHz band or relocating 18 GHz incumbents to 24 GHz under a reasonable equivalency plan.

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[24] *Amer. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1045 (D.C. Cir. 1987) (emphasis added).

[25] 5 U.S.C. § 553(b)(3)(B).

[26] *Order* at ¶ 18.

MWCA submits that the *Order* oversteps the Commission's legal authority, however, by invoking the military exemption to the APA with respect to the 24 GHz Fixed Service band. This notice and comment defect cannot be "cured" through the petition for reconsideration process.[27] Under the circumstances, the Commission must void its rules with respect to the 24 GHz Fixed Service band and start a rulemaking proceeding *ab initio* to consider transition policies and rules for the band.[28]

III. THE *ORDER* FAILS TO CONSIDER IMPORTANT PUBLIC POLICY AND TECHNICAL ISSUES

Perhaps due to the lack of public proceedings on the issues implicated by the restructuring of DEMS, the *Order* fails to consider important public policy and technical issues. In so doing, the *Order* makes determinations that are manifestly contrary to the public interest. Indeed, without even any discussion, the *Order* reverses the Commission's long-standing policies favoring multiple entry and changes fundamental aspects of an allocation formalized in notice and comment rulemakings. As discussed below, these determinations are contrary to the

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[27] *See, e.g., New Jersey v. EPA*, 626 F.2d 1038 (D.C. Cir. 1980) (stating that an agency allowing petitions for reconsideration "is not an adequate substitute for an opportunity for notice and comment prior to promulgation" and noting "'[p]ermitting the submission of views after the effective date is no substitute for the right of interested persons to make their views known to the agency in time to influence the rulemaking process in a meaningful way'") (citing *United States Steel Corp. v. EPA*, 595 F.2d 207, 214 (5th Cir. 1979)).

[28] *See, e.g., Tenn. Gas Pipeline v. FERC,* 969 F.2d 1141 (D.C. Cir. 1992) (vacating rules adopted without proper notice and comment). *See also Dow Chemical, USA v. Consumer Products Safety Commission*, 459 F.Supp. 378 (D.C. La. 1979) ("An administrative rule which is not issued in accordance with the prior notice and opportunity for public comment procedures of [the APA] . . . is void").

public interest and should be reversed. At a minimum, these issues should be aired in an open public forum.

First, the *Order* makes the determination to halve the number of available DEMS channels. In the 18 GHz band, there were a total of ten DEMS channel pairs available for licensing. In the 24 GHz band, the Commission has allocated only a total of five DEMS channel pairs. Not only does the *Order* fail to justify the halving of the number of channels, *the Order fails to even acknowledge that the number of channels is being altered.* Given the original concerns regarding the scarcity of channels when the 18 GHz DEMS band was allocated—ultimately leading to the adoption of a DEMS one-per-market rule—this monumental revision of the DEMS rule structure should not have been taken without compliance with APA requirements.. This is even more true where, as here, the halving of the number of channels results in a *monopoly over all available 24 GHz DEMS spectrum by one company and its affiliates in nearly every major market in the country.* The practical effects of the *Order*'s conclusions directly conflict with long-standing FCC policies favoring multiple entry and the development of competition.

Second, the *Order* adopts a one-to-four equivalency ratio for 18 GHz incumbents transitioning to new channels in the 24 GHz band. The entire justification for this ratio is a one-page technical analysis contained as an appendix to the *Order*. This "technical analysis," however, relies on what appear to be faulty premises, is internally inconsistent, and is devoid of any citations to recognized engineering authorities:

- For example, the appendix is replete with citations to "typical systems." But, nowhere does the analysis describe how a "typical system" is determined, nor how many "typical systems" exist.

- The analysis is "based on the use of the same or similar equipment to the extent possible" and, "[b]ased on this assumption," determines that "existing licensees will not be able to compensate for losses in the link budget merely by increasing transmitter power." No analysis is undertaken, however, of what aspects of the system preclude existing licensees from raising their transmitter power or, given the requirement "to use different modulation" and in light of the apparent fact that no equipment has been developed for use at 24 GHz, if other modifications required to transition to the 24 GHz band would moot those assumptions.

- The appendix fails to discuss: the determination of the appropriate size of a "typical" cell; the justification for a 99.99 percent quality of service; the estimated demand for service and distribution of this demand geographically; the determination of the rainfall intensity rate to use for a typical cell; why transmitter power cannot be increased to compensate for the spectrum change; why Dynamic Channel Allocation is not not possible in the new band, and, if it is not possible, how much is lost in not being able to use trunking and, possibly, Bandwidth On Demand; what the characteristics of user traffic are like for typical applications; the reasons for choosing, the TCM-16(e/4) and QPSK(1/2) modulation/coding schemes assumed in the extremely limited analysis provided; or, why the gain of the hub antennas cannot be increased in going to the higher frequency band.

In sharp contrast, when the Commission adopted a transition mechanism for microwave licensees in the Emerging Technologies band, the FCC extensively analyzed—and took public comment on—the types of systems deployed in the band and enumerated a wide range of cost considerations affecting transitioning to new facilities.[29] By comparison, the "analysis" in this case is utterly deficient.

Finally, the *Order* fails to question whether it should even consider "preserving" Associated and its affiliate's "rights" in the band. Although not discussed explicitly, the *Order* implicitly determines that, for equitable reasons, the FCC should honor the terms of the licenses granted to Associated and its affiliates in the 18 GHz band. It is axiomatic, however, that all radio licenses are issued subject to the regulatory authority of the Commission. In a case where:

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[29] *Creating New Technology Bands for Emerging Telecommunication Technology*, OET/TS 92-1 (Jan. 1992).

(1) a licensee is operating subject to waivers that arguably change the fundamental character of an allocation; (2) the licensee was subject to charges of non-construction and lack of candor; (3) the licensed systems are not significantly built-out; (4) the waivers granted substantially extend prior waivers granted by the Commission; and, (5) the licensee retains a *de facto* monopoly in most major markets in the country, at the very least, the Commission must weigh these factors against the public interest and the long-standing competitive entry and open competition policies that it is waiving.[30]

IV. CONCLUSION

In sum, by circumventing public notice and comment through a *sub rosa* process, the *Order* incorrectly applied "equitable" principles to act in derogation of the public interest, failing to consider a litany of policy and technical issues surrounding the new 24 GHz allocation. The *Order* impermissibly relies on the mere invocation of the military exemption to shield from public scrutiny unrelated, severable actions by the Commission establishing a new radio service and granting the lion's share of the licenses in that new service to a single entity and its affiliates.

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[30] *See generally* Consolidated Petition To Deny and Petition To Determine Status of Licenses, File Nos. 9607682 *et al.* (Sept. 6, 1997); Reply Brief in Support of Consolidated Petition To Deny and Petition To Determine Status of Licenses, File Nos. 9607682 *et al.* (Sept. 23, 1997).

Applicable precedent confirms that this action is patently unlawful. The Commission must void its 24 GHz rules and initiate a rulemaking as required by the APA to examine, totally anew, the basis and purpose for a 24 GHz DEMS allocation.

Respectfully submitted,

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